

Scope and Limits of Ijtihad for the Continued Evolution of Islamic Law

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This Article addresses the plethora of opinions stirred by the debate with regard to the closure of the gate of ijtiḥād. Some scholars argue that ijtiḥād, or creative endeavour by jurists, came to a halt during the third century of the Muslim era so much so that its gate was closed, 'never again to be reopened'.¹ This standpoint implies that the law froze so that only legal conformism could ensue. In contrast, others assert that the gate of ijtiḥād never closed, either in theory or in practice. Some authors abide by neither theories and believe that even if an event such as the closure of the gate of ijtiḥād did occur, they find no objection as to why that gate may not be reopened so as to adapt the law to present-day human relations. Following an overview of what ijtiḥād entails in Section 2, this Article analyses the wide range of accounts for the closure of ijtiḥād in Section 3. Based on this aperçu of the divergent standpoints, the author suggests an equation that best suits the continued evolution of Islamic Law in Section 4.

I. INTRODUCTION

One of the characteristics of Islamic law lies in its distinction between the revealed sources and the law.² The former contains the latter, which are not self-evident and must be discovered by the jurist through the arduous task of *ijtiḥād*.

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¹ Hamilton Alexander Rosskeen Gibb, *Modern Trends in Islam* (University of Chicago Press 1947) 13.

² The first source of Islamic law is the *Quran*: the revealed words of God. These were revealed to the Prophet Muhammad over a period of 23 years (from the age of 40 until his death at the age of 63: 609-632 AD). The Meccan verses, which contain moral and religious exhortations, refer to the revelations made to Muhammad by God through the angel Gabriel from 609 AD to 622 AD. Due to persecutions, Muhammad had to run to Medina in 622 AD. He received further revelations known as the Medinan verses, which dealt with social and legislative issues.

With its literal meaning to 'endeavour', *ijtihad* is the process by which the jurist puts his utmost effort into independent reasoning to interpret the *Quran* and the *Sunnah*³ which together form the *Sharia* – or immutable and divine sources of Islamic law.

As *ijtihad* amounts to a human endeavour, its outcome is prone to change in accordance with time, place and social realities. In the strict sense, the process of *ijtihad* comprises four levels. First, *al-ijtihad al-mutlaq al-mustaqîl*, being the absolute and independent *ijtihad* carried out by the founders of the four Sunni schools of law. Second, *al-ijtihad al-mutlaq al-muntassab*, the absolute *ijtihad*, but affiliated to a school of law, such as that undertaken by Abu Yusuf or Muhammad al-Shaybani in the Hanafi school. Third, *al-ijtihad fi al-madhhab*, which is the *ijtihad* carried out within a school of law. Lastly, *al-istinbat fi ba'dh-il-massail faqat*, which consists of developing a specific point of law within a school of law.

Thus, when an author states that the gates of *ijtihad* closed at the end of the third century AH, one cannot be implying that *all* levels of *ijtihad* has come to a halt, to the extent that no reasoning on any given point of law has been undertaken since the fourth century of the Hijra. This is however what most Western scholars have asserted: that the law has not changed and from that point onwards, jurists may only claim to have undertaken *taqlid* (legal conformism) in order to establish juristic positions. Some authors have gone so far as to employ medical terminology to describe the legal activity of *muqallids* (a jurist practicing *taqlid*). For instance, Joseph Schacht, one of the most prominent Western scholars on Islamic law, made use of the term 'ankylosis'.⁴ According to Schacht, Islamic law has become so rigid, to the point that legal activity has become solely characterised by imitation and a lack of originality.⁵

Writings from Schacht,⁶ Coulson,⁷ JND Anderson,⁸ and HAR Gibb,⁹ among others have been met with criticism, challenging whether the closure of *ijtihad*

³ The *Sunnah* are the practices of the Prophet. They consist of his sayings, his deeds and his tacit approvals and are partially divine.

⁴ Joseph Schacht, 'Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam' in Robert Brunschvig and Gustave von Grunebaum (eds), *Classicisme et déclin culturel dans l'histoire de l'Islam* (Maisonneuve et Larose 1977).

⁵ *ibid* 141.

⁶ Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1965) 70–75.

⁷ Noel Coulson, *A History of Islamic Law* (first published 1964, Edinburgh University Press 1994) 81–82; Noel Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press 1969) 42–45.

⁸ James Norman Dalrymple Anderson, *Law Reform in the Muslim World* (Athlone Press 1976) 59.

⁹ Gibb, *Modern Trends in Islam* (n 1) 12–13.

ever took place. Responding negatively to his article entitled 'Was the gate of *ijtihad* closed?', Professor Hallaq demonstrates that *ijtihad* has continued to exist long after the Islamic golden age.¹⁰ Professor Kamali took a different tone and claimed that *ijtihad* manifests itself through 'statutory legislation, judicial decision and learned opinion (*fatwa*), and scholarly writings'.¹¹

Some authors have adopted an indecisive stance, neither affirming that the gate was tightly shut nor defending that it had always remained open. They acknowledge *ijtihad's* finer degrees and conclude that the closure is not true of all forms of *ijtihad*. One point on which they concur is that there may never have been an '*ijma*'¹² of jurists deciding to put an end to *all* forms of legal endeavour. Bernard Weiss thus writes, that 'the notion that at the end of the Third Century the doctors of Islam reached an immutable consensus of opinion that further *ijtihad* was unnecessary is untenable'.¹³

The question of the closure of the gate of *ijtihad* is one that has stirred numerous discussions and filled many a volume. Central to the issue is one's definition of *ijtihad*, which may be used in either of two ways: to prompt the reader into believing that the gate was irreversibly slammed, or to lead him to a finer understanding of Islamic law as an evolutionary legal system. Equally as important is one's account of the closure of the gate. Some authors believe its causes to be *intrinsic* to Islamic law, such as *ijma*, thereby excluding the possibility that evolution may ever come from *within* the legal system, which sealed itself. Some scholars who argue that extrinsic factors must be taken into consideration acknowledge that Islamic law is capable of evolution. Thus behind the argument in favour or against the closure of the door of *ijtihad* lies a specific understanding of Islamic law as a rigid legal system, stuck in the past and impermeable to development, or as a body of law capable of evolving and renewing itself in accordance with its day and time. Following our critical overview of the various stances and what they entail with regards to the evolution of Islamic law, we shall envisage which position grants jurists the largest scope of action, all the while retaining the legal system's conservative, but not petrified, character.

¹⁰ Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle Eastern Studies 3, 13.

¹¹ Mohammad Hashim Kamali, 'Law and Society: The Interplay of Revelation and Reason in the Shariah' in John L Esposito (ed), *The Oxford History of Islam* (OUP 1999) 117.

¹² *Ijma* is defined by George F Hourani as 'the unanimous opinion of the Sunnite community in any generation on a religious matter' in 'The basis of Authority of Consensus in Sunnite Islam' (1964) *Studia Islamica* 21, 13.

¹³ Bernard Weiss, 'Interpretation in Islamic Law: The Theory of Ijtihad' (1978) *American Journal of Comparative Law* 199, 208.

II. *IJTIHAD*, THE INSTRUMENT OF ARGUMENTATION: FROM DEFINITIONAL DISCREPANCIES TO A PRACTICAL APPRECIATION

In this Section, we shall see that the definition of *ijtihād* is pivotal to one's appreciation of Islamic law either as a legal system bound by the past or as one open to change and development. The broader the definition, the greater the impact of the closure of the gate on legal activity and the easier it is to portray Islamic law as a rigid legal system. Likewise, erratically evoking *ijtihād*'s different levels without specifying on which one the gate was closed might lead the reader into believing that *all* forms of *ijtihād* have ceased. In contrast, the more precise the definition of *ijtihād* is, the less consequential the effect of the closure on legal reasoning. Thus if one asserts that the gate did close and broadly defines *ijtihād* as 'legal interpretation', it then leaves little room, if any, for the eventuality that a jurist may have undertaken *ijtihād* ever since. Defining *ijtihād* and accounting for its closure are far from being neutral and objective undertakings, as they are incidental to whether one views Islamic law as an evolutionary or historical science.

2.1 Extending the *Sharia's* Atemporal Fixedness to Islamic Law

Prominent Orientalist writers such as Noel Coulson, Joseph Schacht and JND Anderson, who argue that the door of *ijtihād* has closed, leave little room for *ijtihād* carried out by the founders of the four Sunni legal schools. As they omit to precisely defining the concept and never agree on its content, the reader gets the general impression that *ijtihād*, as understood in *all* its acceptations, has ceased toward the end of the third century AH. Such an appreciation of *ijtihād* thus obliterates any prospect of evolution of Islamic law.

Schacht, a Western reference in Islamic law, devotes an entire chapter to the question of 'The Closing of the Gate of Independent Reasoning' in *An Introduction to Islamic Law*. Although his introductory and conclusive remarks appear to be coherent, the same may not be said of the body of his argument, which incoherently evokes several degrees of *ijtihād*. Although he states that 'by the beginning of the fourth century of the hijra, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled',¹⁴ he contradicts himself when he later states that 'whatever the theory might say on *ijtihād* and *taklid*,¹⁵ the activity of the later scholars, after the 'closing of the door of *ijtihād*', was no

¹⁴ Schacht, *An Introduction to Islamic Law* (n 6) 71.

¹⁵ *Taklid* (also spelt *Taqlid*) refers to legal conformism to past views and opinions of jurists.

less creative than that of its predecessors. This activity was carried out by the *muftis*.¹⁶ Thus, at this point in the chapter, the reader is perplexed with regards to Islamic law's evolution. How could the *muftis* have been 'no less creative' than their predecessors, when there had been a consensus that from the mid-third century AH onwards that no one could carry out independent reasoning?

Adding to the reader's confusion, Schacht first states that 'the final doctrine of a school inevitably goes far beyond the opinions held by its founder' and that 'even during the period of *taklid*, Islamic law was not lacking in manifestations of original thought'. Here, the reader is tempted to conclude that Schacht distinguishes *ijtihad* carried out by the founders of the Sunni schools which, according to the author came to a halt in the third century AH, from *ijtihad* carried out by jurists *within* a particular school which continued after the schools were established. Schacht even seems to qualitatively compare the two forms of *ijtihad* when he states that the latter 'inevitably goes far beyond' the former. However, he immediately adds 'but this original thought could express itself freely *in nothing more than systematic constructions* which affected neither the established decisions of positive law nor the classical doctrine of the *usul al-fiqh*'.¹⁷ Once more, the reader is confused. How is it possible that the final doctrine of a school may simultaneously 'go far beyond the opinion held by its founder' and yet be 'nothing more than systematic constructions'? In the space of a single paragraph, Schacht acknowledges the occurrence of *ijtihad* at the level of a legal school, and then annihilates it completely. The reader thus gets the sense that *ijtihad* by the founders of the four Sunni schools *and* by jurists within a legal school is dead letter.¹⁸

Overall, Schacht's account of the closure of *ijtihad* lacks coherence on two levels. First, he alternates 'opinions held by a school's founder', 'the final doctrine of a school' and *ijtihad* at the individual level ('all scholars'). Secondly, his argument is misleading as he admits, and then refutes, the possibility that there may have been creative legal endeavour on jurists' behalf. As a result of these definitional and substantive vacillations, the reader risks interpreting the author's final statement as encompassing *all* forms of *ijtihad*: 'Islamic law, which until the early Abbasid period had been adaptable and growing, from then onwards became increasingly rigid and set in its final mold'.¹⁹ Thus Schacht omits to specify with regards to which form of *ijtihad* the closure occurred.

¹⁶ Schacht, *An Introduction to Islamic Law* (n 6) 73 (emphasis added).

¹⁷ *ibid* 71-72. *Usul al-fiqh* refers to the principles of Islamic jurisprudence.

¹⁸ 'Dead letter' refers to a law that is no longer enforced but has not been formally repealed.

¹⁹ Schacht, *An Introduction to Islamic Law* (n 6) 75.

Such an account of Islamic legal history categorically annihilates any prospects of evolution and gives Islamic *law* the same immutable quality as the *Sharia*, an amalgamation deemed unacceptable by jurists of Islamic law. Diagnosed with ‘anachylosis’, Islamic law is depicted as immune to any form of development whatsoever. Hence when making a statement with such serious consequences as ‘the gate of *ijtihad* was closed, never to be reopened’,²⁰ it is one’s duty to specify which *ijtihad* one is addressing so as not to mislead the reader into believing that Islamic law is altogether resistant to evolution. Likewise, it is the reader’s duty to be aware of an academic’s background: thus Coulson and Schacht, both Western scholars, wrote at a time of colonial domination of Muslim lands by European powers during which the latter propagated their own doctrines and legal codes. This is heightened by the fact that Western authors were influenced by each other’s respective publications.²¹

2.2 A Finer Understanding of Islamic Legal Concepts

For a finer understanding of *ijtihad*, one may turn to Bernard Weiss’ article entitled ‘Interpretation in Islamic Law: The Theory of Ijtihad’, in which he explains that *ijtihad* comprises of three levels ranging from that which is ‘directed at a particular question of law, to *ijtihad* confined solely to the limits of one’s particular *madhahib*, and to the “absolute” *ijtihad* exemplified by the founders of the great schools’.²²

It is precisely these different degrees of *ijtihad* which Coulson and Schacht have omitted in their definitions, thus misguiding the appreciation of Islamic law in the West. In stating that ‘some types of legal texts accommodated change and growth in legal doctrine, while others were fairly impermeable’,²³ Judith E Tucker recognises that there may be room for legal evolution depending on the text in question. Quoting Baber Johansen, she stresses:

²⁰ Gibb, *Modern Trends in Islam* (n 1) 13.

²¹ Coulson’s bibliography is illustrative of the disproportionality between Western sources and Arabic or Islamic sources: the former include works by Joel Anderson, Neil Benjamin Edmonstone Baillie, Georges-Henri Bousquet, Carl Brockelmann, Noel Coulson, Edmond Fagnan, Maurice Gaudetroy-Demombynes, Ignaz Goldziher, Gustave E von Grunebaum, Charles Hamilton, Henri Laoust, Reuben Levy, Louis Milliot, Count Leon Ostrorog, James Douglas Pearson, Jules Roussier, David Santillana, Joseph Schacht, Émile Tyan etc. whilst the latter include writings by Kemal Faruki, Majid Khadduri, Sobhi Mahmassani, I Mahmud, Abdur Rahim, and Abd-ar-Rahman.

²² Weiss (n 13) 208. *Madhahib* (singular *madhhab*) refers to the schools of Islamic law.

²³ Judith E Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (University of California Press 1998) 11.

Western scholars who based their theory of the steady-state character of Islamic law on their readings of *mutun* [textbooks that summarised the doctrine of a jurist's legal school] were not mistaken in their claims of continuity and conservatism. When we come to the *shuruh* texts [commentaries on legal doctrine in relation to specific situations or problems], however, we begin to see some room for maneuver.²⁴

Tucker's criticism may, to a certain extent, be true of most academics that have never gained experience in legal practice, as their research focuses on theory at the expense of actual practice. This is true of any legal system, those who seek to understand the French or Islamic legal systems will undoubtedly view them both as rigid and overtly conservative if they only look into the Napoleonic Code or *mutun*. To truly appreciate a legal system, one must understand how jurists and legal practitioners bring it to life.

2.3 A Practical Appreciation of *Ijtihad*

In order to refute Western scholarship's justification of the closure of *ijtihad*'s gate, authors such as Professor Hallaq, Professor Kamali and Professor Gerber have thus written about how the finer degrees of *ijtihad* were put into practice.

Gerber argues that while Islamic law in the post-classical period was based largely on following the footsteps of the past masters, it contained an important element of openness and flexibility. He examines the fatwa collection of seventeenth century Palestinian *mufti* (Islamic scholar) al-Ramli, who understood the term *ijtihad* to bear four different meanings; choosing a particular verse or tradition; extracting the law in the absence of a solution from the revealed sources; making an effort to derive the law from the sources in which 'no objective aid' existed; and a *mufti* or *qadi*'s (judge's) experience.²⁵ If one takes into account al-Ramli's first understanding of *ijtihad*, that is, choosing a verse or tradition over another, it would be incoherent to affirm that *ijtihad* ever ceased. Although there were diverging views surrounding a *mufti*'s role in 17th century Syria and Palestine, the fact that al-Ramli openly practiced *ijtihad* suffices to discredit Schacht's depiction of the gate's closure as irrefutable.

In his article entitled 'Was the Gate of *Ijtihad* Closed?' Hallaq demonstrates that *ijtihad* was widely accepted both in theory as well as in practice, and that it has been carried out throughout history. In theory, he argues that because *ijtihad* is

²⁴ *ibid* 13.

²⁵ Haim Gerber, 'Rigidity versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Mufti Khayr al-Din al-Ramli' (1998) 5(2) *Islamic Law and Society* 165, 182.

the only means by which Muslims may classify their acts as obligatory, forbidden, recommended, permissible or disapproved, jurists could not have simply done away with it. Regarding the practice of *ijtihad*, Hallaq states that whether the door of *ijtihad* had been closed was contingent on 'two elements that complete each other: the existence or extinction of *mujtahids*,²⁶ and the jurist's consensus'.²⁷ He notes that the rapid growth of *fatwas* appeared and continued to grow 'rapidly from the fourth/tenth century onwards'²⁸ and after analysing the legal practice and literature, he concludes that jurists fulfilling the requirements to carry out *ijtihad* existed at all times and that 'up to ca. 500 A.H. there was no mention whatsoever of the phrase '*insidad bab al-ijtihad*'.²⁹ Weiss puts the question of the existence of *mujtahids* into perspective and stresses that it is one thing to discuss whether a generation of Muslims could have been without a *mujtahid*, yet another to affirm that the gate of *ijtihad* had been forever closed.³⁰

To illustrate that Islamic law is not a thing of the past, but a legal system that is very much alive and prone to development, Kamali brings to light legal practices of Muslim States, namely 'statutory legislation, judicial decision and learned opinion (*fatwa*), and scholarly writings'.³¹ He provides examples of each practice to support his statement: legal reforms of family law, particularly those curtailing the husband's right to polygyny and divorce, which derive 'some support from the jurists' doctrines of the Maliki and Hanafi schools, but [are reforms] essentially based on novel interpretation of the Quran's relevant portions'.³² He then points out instances of *ulamas'* (Islamic scholars') independent reasoning, such as that of 'Muhammad Rashid Rida in the 1920s and those of the late shaykh of Azhar, Mahmud Shaltut, in the 1950s'.³³ As an example of judicial *ijtihad*, Kamali turns to the 1967 case of *Khursid Bibi v Muhammad Amin*,³⁴ in which the Supreme Court of Pakistan validated *khula* (divorce at the wife's initiative) even without the consent of the husband.³⁵ With regards to scholarly activity, Kamali refers to the writings of Egyptian scholar

²⁶ Under Islamic Law, a *mujtahid* undertakes *ijtihad* or creative legal endeavour.

²⁷ Hallaq (n 10) 21.

²⁸ *ibid* 18.

²⁹ *insidad bab al-ijtihad* that is, closure of the gate of *ijtihad*; *ibid* 4.

³⁰ Weiss (n 13) 208: 'Writers on *usul al-fiqh* (theory of law) discuss whether it is possible for any generation of Muslims to be without a *mujtahid*, but are far from being in agreement on an answer. In any case, to affirm that a generation of Muslims could exist without a *mujtahid* is not the same as affirming that the 'gate of *ijtihad*' has been irrevocably closed'.

³¹ Kamali (n 11) 117.

³² *ibid*.

³³ *ibid*.

³⁴ *Khurshid Bibi v Muhammad Amin* PLD (1967) SC 97.

³⁵ Kamali (n 11) 118.

Yusuf al-Qaradawi, who carried out *ijtihad* so as to legalise travel by women unaccompanied by male relatives.³⁶ As Kamali explains, 'according to the rules of fiqh that were formulated in premodern times, women were not permitted to travel alone'.³⁷ Al-Qaradawi based his conclusion on the analysis that the initial ruling was intended to ensure women's physical and moral safety, and that modern air travel fulfils this requirement. Kamali notes 'he further supported this view with an analysis of the relevant *hadiths* [reports of what the Prophet said] on the subject and arrived at a ruling better suited to contemporary conditions'.³⁸ This is a perfect example of human interpretation of the *Sharia* through *ijtihad* in an evolutionary manner that takes into account novel conditions.³⁹

Thus, the importance of defining *ijtihad* and other legal concepts when discussing the closure of the gate cannot be emphasised enough. Whereas Orientalist scholars have tended to avoid defining *ijtihad*, defining it too broadly or incoherently evoking a different examination, scholars such as Weiss, Tucker and Kamali have exerted more effort in their appreciation of the concepts at hand. Authors who unequivocally argue against the eventuality of the closure of *ijtihad*, such as Hallaq and Gerber, have gone so far as to give practical occurrences of *ijtihad*, be it at the level of the *madhhab* or at an individual level, as illustrated by al-Ramli's interpretation of *ijtihad*. The main area of contention surrounding the debate lies in the irreversible character of the closure of the gate. Stating that the gate was closed 'never to be reopened' may mislead the reader to wrongfully annihilate any prospects of evolution coming from within Islamic law. Equally as important as defining *ijtihad* is how one accounts for it.⁴⁰

III. ACCOUNTING FOR THE CLOSURE OF *IJTIHAD*: AN INEVITABLY TENDENTIOUS TASK

Just as defining *ijtihad* is far from being a neutral, objective undertaking, so is the way one accounts for (or against) the closure of the gate of *ijtihad*. Some of the authors who argue that the gate of *ijtihad* closed towards the end of the third century AH bring forward causes *intrinsic* to Islamic law such as *ijma'*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Novel issues such as the monthly payment of *zakat* (alms giving) fall under the category of *fiqh an-nawazil* which consists of tackling new issues based on the *Sharia* for which there are no precedents.

⁴⁰ Gibb, *Modern Trends in Islam* (n 1) 13.

while others, less categorical about the likelihood of the event, admit that events *extrinsic* to Islamic law played a role in the stagnation of law.

3.1 The Closure of the Gate of *Ijtihad*: Intrinsic or Extrinsic to Islamic Law?

The majority of Western scholars hold that *ijma'* led jurists to cease all activity which may have amounted to *ijtihad*. Coulson thus writes that 'the doctrine became settled and ratified, at least within each school, by the general consensus, and the belief gained ground, in the circles of jurists, that the process of *ijtihad* had run its full course'.⁴¹ However, there is a significant inconsistency between Coulson's *A History of Islamic Law* and his subsequent work *Conflicts and Tensions in Islamic Jurisprudence*. In the former, Coulson immediately excludes the Mongolian invasions of Islamic territories as an anachronistic justification, stating that 'historically the phenomenon (of the closure of *ijtihad*) occurred some three centuries before this'.⁴² He further states that the 'phenomenon' was thus:

... [T]he result not of external pressures but of *internal causes* ... [T]he material sources of the divine will ... had been fully exploited. An exaggerated respect for the personalities of former jurists [and *ijma's*] spread ... [W]hen the consensus of opinion in the tenth century asserted that the door of *ijtihad* was closed, Islamic jurisprudence had resigned itself to the inevitable outcome of its self-imposed terms of reference.⁴³

Coulson contradicts himself however, as he later affirms that 'apart from the fact that the cessation of *ijtihad* is explicable as the inevitable result of the historical development of *Shari'a* law, a universal consensus to this effect had never existed'.⁴⁴ He undermines the probability that a consensus on the closure of the gate of *ijtihad* may have occurred, arguing that 'in fact, the Hanbalis had consistently maintained the impossibility of any real consensus after the generation of the Prophet's contemporaries – on the ground that it had become impracticable to ascertain the views of each and every qualified jurist, and in the fourteenth century, the Hanbali scholar Ibn-Taymiyya had himself claimed the theoretical right of *ijtihad*'.⁴⁵ He even goes as far as to discredit *ijma'* on the

⁴¹ Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 7) 42.

⁴² Coulson, *A History of Islamic Law* (n 7) 81.

⁴³ *ibid* (emphasis added).

⁴⁴ *ibid* 202 (emphasis added).

⁴⁵ *ibid* 202–203.

ground that its authority was 'laid down by classical Muslim jurisprudence and not by any unequivocal dictate of divine revelation'.⁴⁶

In *Conflicts and Tensions in Islamic Jurisprudence*, published five years after *A History of Islamic Law*, Coulson gives yet a different account for the closure of *ijtihad*: after rejecting the Mongolian invasion as a 'fanciful and unnecessary' factor in the closure of *ijtihad* as he had done in his *History*.⁴⁷ He states that 'the fact is that Muslim lawyers⁴⁸ were creatures of precedent, for whom the essential purpose of law was to stabilize the social order'.⁴⁹ This account of the closure of *ijtihad* is far from that which Coulson gives in his *History*. He goes on to write that:

... [T]his was essentially because *Islamic society itself remained relatively static throughout this time* [during "the legal tradition of ten centuries"]. There was in fact *no real social impetus to challenge the authority of the medieval legal manuals* until the past few decades of the present century. However now, when Islamic society has come to accept different values and standards of behaviour, the traditional doctrine has been challenged and the principle of *taqlid* called more and more into question.⁵⁰

Not only does Coulson portray Islamic law as rigid, he goes so far as to characterise its society as such, which is an unacceptable amalgamation and generalisation. His argument would perhaps have been more tangible had he connected the need for social order to the aftermath of the Mongolian invasion. Moreover, had Islamic society played such a crucial role in the stagnation of the law, why had Coulson not mentioned it five years earlier in *A History of Islamic Law*?

Writing almost 20 years prior to Coulson, HAR Gibb provides yet another account of the closure of *ijtihad*, which he understands as the 'striving to discover the true application of the teachings of Koran and tradition to a particular situation'.⁵¹ According to Gibb:

⁴⁶ *ibid.* Thereby ignoring the Hadith according to which the Prophet said "my community will not collectively agree on an error".

⁴⁷ Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 7) 44.

⁴⁸ The term 'lawyer' here is anachronical and incorrect, as legal representation does not exist under traditional Islamic law.

⁴⁹ Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (n 7) 44.

⁵⁰ *ibid.* (emphasis added).

⁵¹ Gibb, *Modern Trends in Islam* (n 1) 12.

The orthodox theologians, fearing that to recognise the legitimacy of *ijtihad* might open the door to individual reinterpretation and schism, have always done their best to limit its scope. According to the classical doctrine, the range of *ijtihad* was progressively narrowed down, as successive generations of doctors, supported by 'consensus', filled up the gaps in the doctrinal and legal systems. Finally, no more gaps remained to be filled, or only very insignificant ones, and thereupon "the gate of *ijtihad* was closed", never again to be reopened.⁵²

Surprisingly, the same author provides yet another justification for the legal stagnation in *Mohammedanism: An Historical Survey* which he owes to the political turmoil that followed the decline of the Abbasid Caliphate (having an *extrinsic* effect on Islamic law):

... [H]owever seriously the political and military strength of the vast Empire might be weakened, the moral authority of the Law was but the more enhanced and held the social fabric of Islam compact and secure through all the fluctuations of political fortune.⁵³

Thus, Gibb shifts from an internal factor (*ijma'*) to an external one (the decline of the Abbasid Caliphate): in the first case, the legal stagnation is irreversible (unless another *ijma'* decides to open the gate of *ijtihad*) yet in the second case it is contingent on the historic-political situation, hence susceptible to change.

In addition to *ijma'*, Schacht lists several other factors which restricted the 'freedom to exercise one's own judgement independently'⁵⁴ all of which are intrinsic to Islamic law:

[T]he formation of groups or circles within the ancient schools of law, the subjection of unfettered opinion to the increasingly strict discipline of systematic reasoning, and last but not least the appearance of numerous traditions from the Prophet (and from his Companions), traditions which embodied in authoritative form what had originally been no more than private opinions.⁵⁵

⁵² *ibid* 12–13 (emphasis added).

⁵³ Hamilton Alexander Rosskeen Gibb, *Mohammedanism: An Historical Survey* (OUP 1969) 7–8.

⁵⁴ Schacht, *An Introduction to Islamic Law* (n 6) 70

⁵⁵ *ibid*.

Stephen Humphreys gives a plausible explanation for Western authors' account of the closure of *ijtihad*'s gate:

Until very recently historians of Islam have been extremely reluctant to regard law and jurisprudence as a significant source for social and economic life. For anyone familiar with the importance of law in the study of Roman or English history, such behaviour must seem simply obtuse. Yet there are reasons for it. First of all, Western scholars have been more interested in the theoretical jurisprudence of Islam (*usul al-fiqh*) than in the practical application of the principles of law to specific cases (*furu' al-fiqh*). Most Orientalists, after all, are not lawyers but students of culture. Thus they have tended to approach Islamic law as a religious orientation and a mode of thought rather than as a body of rights, obligations and rules of procedure.⁵⁶

As previously mentioned, one must always distinguish between the *Sharia* and Islamic law (the latter being the *result* of the former's interpretation) on the one hand, and between legal theory and legal practice on the other. Amalgamating these concepts carries the risk of grossly misrepresenting the Islamic legal system as 'petrified' or 'inflexible'.

One might also agree with Moors who states that 'the concentration of Orientalists on the texts composed by the founders of the legal schools and the summaries of their doctrines has probably contributed to the notion of Islamic law as a closed and static system'.⁵⁷

Perhaps a point on which scholars who adopt a mitigated stance with regards to the closure of the gate of *ijtihad* as well as those who refute it completely

⁵⁶ R Stephen Humphreys, *Islamic History: A Framework for Inquiry* (Princeton University Press, 1991) 209 (emphasis added); 'As the founder of Islamic legal studies in the West, Christiaan Snouck Hurgronje, pointed a century ago: *Fiqh is distinguished from modern and Roman law in that it is a doctrine of duties in the broadest sense of the word, and cannot be divided into religion, morality, and law. It deals only with "external" duties – i.e., those which are susceptible to control by a human authority instituted by God. However, these duties are without exception duties toward God, and are based on the unfathomable will of God Himself. All duties that men can perceive being carried out are dealt with ...* Profound as this insight was, it had the unfortunate consequence of establishing a highly idealized view of *fiqh* – as if it embodied only the vain dreams of aged *ulama* cloistered in their mosques and did not hope to mould the affairs of everyday life'.

⁵⁷ Annelies Moors, 'Debating Islamic Family Law: Legal Texts and Social Practices' in Margaret L Meriwether and Judith E Tucker (eds) *A Social History of Women and Gender in the Modern Middle East* (Westview Press 1999) 144.

concur is the improbability that there ever was a general consensus of jurists putting an end to *ijtihād*.

3.2 The Practical Improbability that an *Ijma'* Froze *Ijtihad*

In *A History of Islamic Law*, Coulson finds *ijma'* to be the root cause of the closure of the gate of *ijtihād*, stating that 'once formed the *ijma'* was infallible. As the acknowledged sphere of the *ijma'* in this broad sense spread, the use of independent judgment or *ijtihād* eventually disappeared altogether. *Ijma'* had thus set the final seal upon the process of increasing rigidity in law'.⁵⁸ Although *ijma'* has the same legal value as *nass* (text), what Coulson fails to appreciate is that unlike the *Quran*, it is not infallible. Thus, an *ijma'* can undo a previous *ijma'*. Weiss further clarifies the notion of *ijma'*, stating that 'consensus may arise out of the *ijtihād* of jurists, but once it is established it becomes a starting point for further *ijtihād*. *Ijtihad* is the on-going process which yields the virtually inexhaustible Law of God'.⁵⁹

Supposing an *ijma'* had effectively put an end to *ijtihād*, it would not have been irreversible, as Coulson implies. In practical terms, however, an *ijma'* at the end of the third century of the Hijra would have been highly unlikely if not impossible, as the Abbasid Empire covered too vast an area for jurists to physically gather in one place at a given time. Weiss makes clear that it is impossible that the closure of the gate of *ijtihād* may have come from *within* Islamic law when he states that:

The 'closing of the gate of *ijtihād*' and the corresponding general shift to *taqlid* was more *an accident of history than a requirement of theory*. The notion that at the end of the Third Century (or shortly thereafter) the doctors of Islam reached an immutable consensus of opinion that further *ijtihād* was unnecessary is untenable.⁶⁰

Weiss then refutes *ijma'* as the 'primary cause of legal conservatism'⁶¹ and downplays the role attributed to it by Western authors: 'While there is a tendency among Islamicists⁶² to regard the Consensus as a compendium of juristic interpretation that the Community considers to be absolute and immutable, *the actual role of the Consensus is more modest*'.⁶³

⁵⁸ Coulson, *A History of Islamic Law* (n 7) 80 (emphasis added).

⁵⁹ Weiss (n 13) 208.

⁶⁰ *ibid* (emphasis added).

⁶¹ *ibid*.

⁶² i.e. Orientalists.

⁶³ Weiss (n 13) 208 (emphasis added).

Finally, one may argue that there may never have been an *ijma'* forbidding further *ijtihad* as there has never in fact been a consensus regarding what *ijma'* itself amounts to.

Although the aforementioned authors represent a wide range of opinions, perhaps the only point on which they concur, regardless of whether they argue for or against the closure of the gate of *ijtihad*, is that since the end of the third century AH, no other Sunni legal school was created.

3.3 “Absolute *Ijtihad*”: A Common Denominator

One point which scholars may not refute regardless of their stance on the closure of the gate of *ijtihad*, is that of *al-ijtihad al-mutlaq al-mustaqîl*. That is, ‘absolute’ *ijtihad* as carried out by Abu Hanifa, Malik, al-Shafi’i and Ahmad ibn Hanbal, came to a halt towards the end of the third century AH. As Hallaq points out, ensuing scholars’ activity, however creative, had to be contained in a certain school’s doctrine: ‘in essence all teachings had to be attributed to one eponym or another’.⁶⁴ Thus, creative jurists such as Abu Yusuf, Shaybani and Muzani had to link their doctrines to a great master. Hence, Hallaq concludes that ‘in the last three or four decades of the fourth/tenth century a comprehensive but implicit agreement on the illegality of establishing new schools and of any ‘separatist’ tendencies was reached’.⁶⁵ Likewise, George Makdisi concludes that: ‘The fourth/tenth century put an end to new *madhhabs*, but not to *ijtihad*’.⁶⁶ Both Hallaq and Chibli Mallat agree that the causes of the narrowing down to the four Sunni legal schools are unknown. Mallat thus states that ‘the reasons why the several hundred schools which were extant in the early centuries have vanished to give way to only four recognized schools in Sunnism are still unclear’.⁶⁷ Nevertheless, there is a difference between asserting that no other legal school was created and affirming that the gate of *ijtihad* forever closed itself on *al-ijtihad al-mutlaq al-mustaqîl*: the former statement does not exclude the possibility that absolute *ijtihad* may one day be exercised and leaves such an eventuality out of man’s reach, whereas the latter statement implies that man has taken control of his religious legal destiny.

Based on our aperçu of the divergent standpoints regarding the closure of the gate of *ijtihad*, we henceforth suggest a solution that best suits the continued evolution of Islamic law.

⁶⁴ Hallaq (n 10) 10.

⁶⁵ *ibid* 11.

⁶⁶ George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press 1981) 290.

⁶⁷ Chibli Mallat, *Introduction to Middle Eastern Law* (OUP 2007) 111.

IV. THE IDEAL EQUATION FOR THE CONTINUED EVOLUTION OF ISLAMIC LAW: BALANCING *TAQLID* AND “EVOLUTIONAL” *IJTIHAD*

4.1 Refuting the Gate’s Closure, but only for the Better

Arguing against the occurrence of the closure of *ijtihad* does not necessarily imply adopting an evolutionary view of Islamic law, as one may take that stance all the while claiming a purely literal interpretation of the *Sharia*. Thus, Muhammad ibn Abd al-Wahhab, founder of the 18th century reformist movement, rejected the closure of the gate of *ijtihad* and was extremely critical of *ijtihad* undertaken by the other Sunni scholars. He believed that the way in which the *Sharia* had been interpreted withdrew the Muslim community from the Quranic teaching and argued in favour of the strictest reliance on the *Quran* and *Sunnah*. This purely historical perspective rejected anything that diverged from the *Sharia* or from the principle of *tawhid*, which refers to the oneness of God. Such a position may legitimately be qualified using the semantic field of rigidity such as ‘ankylosis’, stiffness and so forth.

Although they also call for a return to Quranic principles, Reformists believe that jurists have a duty to carry out *ijtihad* to make law relevant to the modern times. An example of this is Bourguiba’s Tunisian family code of 1956, which outlawed polygamy.⁶⁸ As Ahmad Qadri illustrates, such an interpretation of the *Sharia* is respectful of what Islamic jurists asserted: ‘though God has given us revelation He also gave us brains to understand it; and He did not intend to be understood without careful and prolonged study’.⁶⁹ Thus, the best way for the jurist to honour God’s word is to invest his outmost effort to interpret it, *not* to follow it in a systematic manner nor interpret it so as to limit the *Sharia* to the first century AH when in reality God intended for it to be timeless.

Thus, *ijtihad* is a perpetual necessity and an inescapable endeavour which even jurists themselves cannot refute. As Mallat points out, claiming that the door of *ijtihad* was closed is in and of itself a form of interpretation: ‘one easy rebuttal of such a strange theory is the simple fact that a ‘legal closure’ in any society or civilisation, since silence itself is an interpretation, cannot be sustained’.⁷⁰ Equally vital to Islamic law (and for that matter to any legal system), is a minimum amount of consistency and continuity.

⁶⁸ See 1956 Tunisian Code of Personal Status, art 18.

⁶⁹ Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World* (Taj Co 1986) 199.

⁷⁰ Mallat (n 67) 110.

4.2 *Taqlid: Like Ratio Decidendi and Stare Decisis, a Legal Necessity*

Authors who have categorically argued for or against the closure of the gate of *ijtihad* have inaccurately portrayed *taqlid* (legal conformism). Thus, in *A History of Islamic Law*, Coulson states that ‘the right of *ijtihad* was replaced by the duty of *taqlid* or “imitation”. Henceforth every jurist was an “imitator” (*muqallid*), bound to accept and follow the doctrine established by his predecessors’.⁷¹ Such statements depicting *taqlid* as blind imitation provoked a defensive reaction on behalf authors such as Hallaq, who felt compelled to demonstrate that jurists never ceased to be active *mujtahids*. While conservatism is a healthy characteristic inherent to every legal system (without which there would be no legal system as such), rigidity is clearly impracticable.

Providing a much more accurate understanding of *taqlid*, Weiss states that ‘although *taqlid* is contrasted to *ijtihad*, it is not totally passive because it entails introspection and an exercise of conscience’.⁷² In other words, and as Professor Baderin illustrates in his article entitled ‘Understanding Islamic Law in Theory and Practice’, *taqlid* amounts to ‘conforming to or following the jurisprudential rulings of *Fiqh* books of any one of the Schools of jurisprudence’.⁷³ Thus, legal conformism is a necessity at the lower court level and without it there would be no legal system as such: ‘[a]lthough many contemporary scholars have challenged the notion of the closing of the gate of *Ijtihad*, the practice of *Taqlid* still prevails amongst lay judges of the lower *Shari’ah* courts in Muslim countries’.⁷⁴ *Taqlid* may therefore be compared to the British *ratio decidendi* or the American *stare decisis* as an indispensable activity that takes place in lower *Sharia* courts as well as, for instance, in the magistrate’s court. Just as an English judge must demonstrate his legal reasoning, so is *ijtihad* based on *dalil* or evidence. If conservatism was a sign of ‘anhylosis’ and rigidity, then the American and British legal systems may be described as such too.

Perhaps the ideal equation lies in Gerber’s statement according to which:

Without a large dose of conservatism no legal system can function, for if decisions are not based on previously existing rules, the result will be arbitrariness. But conservatism may turn into rigidity if it is not alloyed with a measure of flexibility.⁷⁵

⁷¹ Coulson, *A History of Islamic Law* (n 7) 80–81.

⁷² Weiss (n 13) 207.

⁷³ Mashood Baderin, ‘Understanding Islamic Law in Theory and Practice’ (2009) 9(3) *Legal Information Management* 186, 189.

⁷⁴ *ibid.*

⁷⁵ Gerber (n 25) 173.

Thus there must be room for evolutionary *ijtihad* (as opposed to blind conservatism) in a 'back-and-forth' approach, which allows jurists to meet the needs of the society in which they live, all the while remaining faithful to the revealed sources. Moreover, it permits a flexible understanding of Islamic law respectful of the variety of social realities that make up the *Ummah* (the Muslim community).

V. CONCLUSION

It goes without saying that the debate around the closure of the gate of *ijtihad* has stirred a plethora of debate and interpretation. Depending on how much importance one wishes to attribute *ijtihad*, it has led to a wide range of views regarding Islamic law, which is portrayed either as a 'petrified' system, as a conservative one just as any other legal system, or as a perpetually innovative body of law.

The practice of Islamic law – from the process of extracting *Ahkam al-Sharia* (Islamic law) to its application to concrete situations – is most accurately reflected by the middle view which acknowledges that although there may have been a legal stagnation following the formative period, it never prevented jurists from carrying out *ijtihad*. What is more, without *taqlid* there would be no legal system proper. The only form of *ijtihad* which has not been exerted is *al-ijithad al-mutlaq al-mustaqil*, that is 'absolute *ijtihad*' as carried out by Abu Hanifa, Malik, al-Shafi'i and Ahmad ibn Hanbal.

Thus, whether one argues in favour or against the closure of the gate of *ijtihad*, legal endeavour is exercised throughout the Muslim world and has been integrated into the nation-states' branches of government: from the apex of the judicial branch (such as Pakistan's Supreme Court) to statutory reforms in legal areas ranging from family law to finance. In particular, a judge who is qualified to carry out *ijtihad* has a duty to do so. As Professor Baderin points out, 'Muslim jurists are agreed on the fact that a qualified jurist or judge must exercise his own juristic opinion in accordance with the *Shariah*'.⁷⁶

The pertinence of this debate is to be appreciated on both a theoretical level and a practical one. Ideologically, the question of the closure of the gate of *ijtihad* is interesting in that it is revealing of how one wishes to portray Islamic law. Not only must one analyse an author's substantive arguments, but one must always bear in mind the wider context in which a particular article was written. Thus,

⁷⁶ Baderin (n 73) 190.

one may follow the evolution of Western scholarship's attitude toward Islamic law through the question of the closure of *ijtihad's* gate.

Fortunately for those to whom Islamic law is applied, when confronted with novel situations, jurists do not think twice to carry out *ijtihad* on account that its gate may have closed toward the end of the third century AH. They respect their duty to carry out *ijtihad* and although the process might take months and even years to be implemented, they strive to interpret the *Sharia* so as to meet people's needs. Thus, in states where Islamic law is applied, the question of the closure of the gate of *ijtihad* is seldom raised. The importance of carrying out *ijtihad* however may not be overemphasised, as without it there would no *khula* without the husband's consent, polygamy would not be illegal in Tunisia, and Muslims would not be able to pay *zakat* on a monthly basis. These are just a few practical legal issues amongst many that were resolved through the process of *ijtihad*.

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